95-1103

No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM 1995

SETH WAPNICK and JON WAPNICK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court below err by not applying this Court's decision in *Griffin v. United States*, 502 U.S. 46 (1991), and not vacating petitioners' conspiracy conviction, when one of the objects of the charged conspiracy had been invalidated on *legal*, as opposed to *factual*, grounds?

2. Did petitioners' conduct, in which they cashed checks at a bank and then transferred the cash to third parties, require the filing of a Currency Transaction Report, and thereby violate 31 U.S.C. §5313(a)?

LIST OF PARTIES

In addition to the parties set forth in the caption, there were two additional defendants in the criminal prosecution in the United States District Court for the Eastern District of New York, and in the appeal to the United States Court of Appeals for the Second Circuit: Harold Wapnick and Steven Wolfson.

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No. _____

IN THE

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OCTOBER TERM 1995

SETH WAPNICK and JON WAPNICK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Seth Wapnick and Jon Wapnick respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Second Circuit entered July 10, 1995, and October 3, 1995.

OPINIONS BELOW

The July 10, 1995, opinion of the Court of Appeals (Appendix A, *infra*, at 1a-19a) is reported at 60 F.3d 948 (2d Cir. 1995). The Court of Appeals' October 3, 1995, Order denying petitioners' petition for rehearing (Appendix B, *infra*, at 1b) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered July 10, 1995. A timely petition for rehearing was denied October 3, 1995, and this petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §371 states in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

31 U.S.C. §5313(a) states:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the

> Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

STATEMENT OF THE CASE

Introduction

This case involves a set of circumstances controlled by this Court's decision in *Griffin v. United States*, 502 U.S. 46 (1991): one object -- the "structuring" of cash withdrawals in order to avoid the filing of Currency Transaction Reports -- of a multi-object conspiracy was invalid on *legal*, as opposed to factual, grounds as a result of an instruction to the jury that did not require a finding of "wilfulness" [contrary to this Court's subsequent decision in *Ratzlaf v. United States*, ___ U.S. ___, 114 S. Ct. 655 (1994)].

Under *Griffin*, petitioners' conspiracy conviction must be vacated. Yet the Court of Appeals affirmed the conspiracy conviction without even addressing *Griffin* and the line of cases upon which it relied. Instead, the Court of Appeals stated simply that since a prosecution under 18 U.S.C. §371's "conspiracy to defraud the United States" clause does not *require* the commission of an offense against the United States, vacatur of substantive "structuring" counts under

Ratzlaf would not mandate vacatur of the §371 conspiracy count as well.

That analysis, however, ignores the fact that *Griffin* was itself a prosecution under the "defraud" clause of §371, and that regardless of the disposition of the substantive counts, "structuring" was unquestionably an alternative object of the multi-object conspiracy alleged in the Indictment. Therefore, this Court should grant certiorari in order to prevent "end runs" around the clear dictates of *Griffin* with respect to multi-object conspiracies, whether they are styled as conspiracies to "defraud the United States" or to "commit an offense against the United States."

In addition, petitioners were also convicted of failing to file Currency Transaction Reports ("CTR's") for cash transactions in excess of $10,000, in violation of 31 U.S.C. §5313(a). However, petitioners' conduct did not constitute a violation of §5313(a), or the regulations promulgated thereunder. As detailed below, petitioners were not required to file CTR's because the only part of the transaction that involved "check cashing" -- an event precipitating the CTR filing requirements -- was performed at a bank that filed the appropriate CTR's. Petitioners' subsequent transfer of the cash generated at the bank to third parties did not require a CTR, yet that is the act, and the attendant failure to file CTR's therefor, for which they were convicted under §5313(a). It is respectfully submitted that this Court should grant certiorari to decide whether petitioners' conduct required the filing of CTR's under §5313(a), and to preclude this improper expansion of the reach of a federal criminal statute.

Statement of the Facts

Petitioners Seth and Jon Wapnick (hereinafter "Seth" and "Jon"), along with their father Harold Wapnick and Steven Wolfson, were convicted after a ten-week trial of a 152-count Indictment. Petitioners were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. §371, with respect to (a) their preparation of tax returns for taxi drivers; (b) their own tax returns; (c) their failure to file Currency Transaction Reports ("CTR's") for transactions involving more than $10,000 in currency; and (d) their "structuring" of transactions to avoid the CTR reporting requirement.

Petitioners were also convicted of substantive violations of (a) 26 U.S.C. §7206(1), aiding and abetting the filing of false tax returns (of the taxi drivers); (b) failing to file CTR's in violation of 31 U.S.C. §5313(a); and (c) "structuring" in violation of 31 U.S.C. §5324. In addition, Seth was convicted of filing false personal income tax returns in violation of 26 U.S.C. §7206(1). Jon was acquitted of the personal income tax charges against him, and he and Seth also were acquitted of some of the counts charging the substantive offenses listed above.

All of the allegations revolved around the accounting business controlled by Harold Wapnick, in which Seth and Jon were employed. The conspiracy and the substantive offenses charged encompassed four categories of illegal conduct: (1) that defendants, as tax preparers, assisted taxi drivers in preparing false tax returns; (2) that defendants Harold Wapnick, Seth Wapnick, and Jon Wapnick filed false personal income tax returns; (3) that defendants Harold, Seth, and Jon Wapnick knowingly and willfully failed to file Currency Transaction Reports on transactions involving in

excess of $10,000; and (4) that defendants Harold, Seth, and Jon Wapnick "structured" transactions in an attempt to evade currency reporting requirements.

Regarding the CTR and "structuring" part of the case, the testimony at trial established the followin:

Harold Wapnick maintained 13 corporate bank accounts at Republic National Bank. Among other purposes, Harold Wapnick utilized these accounts to provide cash, for a fee, to third-party businessmen.

The cash was provided as follows: a third-party businessman would bring to Harold Wapnick a check payable to (or, in limited instances, from) the third-party businessman's business. That check would be deposited in one of the thirteen corporate accounts. Subsequently, $9,500 checks would be written against any of the thirteen accounts, and cashed at Republic Bank. The cash generated by the bank would then be delivered, less Harold Wapnick's fee, to the third-party businessman.

Bank personnel established that at a certain point the bank began filing CTR's for the cashing of the $9,500 checks, and that Harold Wapnick was so informed. Nevertheless, the transactions did not change at all in character after such notification. Harold Wapnick testified that he was aware from the outset that the bank was filing CTR's, and that because the bank was filing CTR's for the transactions, he believed he was not required to do so.

After petitioners were convicted, but prior to sentencing, this Court decided *Ratzlaf v. United States*, ___ U.S. ___, 114 S. Ct. 655 (1994), which invalidated the "structuring" convictions because the jury was not required to

find proof of an essential element, namely the petitioners' "willfulness". As a result, the "structuring" convictions were vacated by the District Court. Petitioners also moved to vacate their other convictions based on the impact of *Ratzlaf*, *i.e.*, the multi-object conspiracy could not stand because one of its objects was held invalid as a matter of law, but the District Court denied them relief.

Petitioners were each sentenced to 33 months' imprisonment, a $10,000 fine, and three years' supervised release.

The Decisions Below

The Court of Appeals rejected petitioners' argument, *inter alia*, that *Ratzlaf* invalidated not only the "structuring" charges, but also their conspiracy conviction, because once the "structuring" objective was deemed legally insufficient, the governing rule is that it is "impossible to tell" whether the jury relied on the invalid conspiratorial object in reaching its verdict of guilty. *See* Appendix A at 10a-12a (60 F.3d at 952-53).

The Court of Appeals, however, held that "structuring" was not an objective of the conspiracy, since, according to the Court of Appeals, "the substantive crime of structuring under §371 was not a necessary predicate of the conspiracy charge." Appendix A at 11a (60 F.3d at 953). In reaching its conclusion, the Court of Appeals relied in large part on *United States v. Jackson*, 33 F.3d 866 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1316 (1995). *Id.*

The Court of Appeals did not address petitioners' claim that their conduct did not constitute a violation of the CTR requirements of 31 U.S.C. §5313(a) and the regulations

promulgated thereunder.

Rehearing was denied October 3, 1995. *See* Appendix B at 1b.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW MUST BE REVERSED BECAUSE IT PERMITS WHOLESALE EVASION OF THE CLEAR RULE ESTABLISHED BY THIS COURT IN *GRIFFIN V. UNITED STATES*

In *Griffin v. United States*, 502 U.S. 46 (1991), this Court clarified an important issue in criminal law by distinguishing between two situations: those in which a single object of a multi-object conspiracy is found insufficient as a matter of *law*, and those in which the insufficiency is as a matter of *fact*. In the former, the conspiracy conviction must be vacated; in the latter, the conspiracy conviction is valid. 502 U.S. at 52-59. *See also United States v. Nieves-Burgos*, 62 F.3d 431, 434-35 (1st Cir. 1995).

The decision below seriously undermines *Griffin*, permitting evasion of that rule in cases involving the "conspiracy to defraud the United States" prong of 18 U.S.C. §371, even though *Griffin* itself involved the "conspiracy to defraud" clause. Accordingly, it is respectfully submitted that certiorari should be granted to vindicate the important rule and distinction set forth in *Griffin*.

Petitioners' principal claim on appeal was the impact of this Court's decision in *Ratzlaf v. United States*, ___ U.S.

___, 114 S. Ct. 655 (1994), which invalidated their "structuring" convictions. Since "structuring" was an object of the conspiracy charged against them, petitioners asserted that, under settled doctrine established by *Griffin* and its predecessors, including *Yates v. United States*, 354 U.S. 298, 311-12 (1957) and *Stromberg v. California*, 283 U.S. 359, 367-68 (1931), the conspiracy could not survive after one of its objectives had been voided on *legal* (as opposed to factual) grounds.[1]

In affirming petitioners' conspiracy conviction, the Court of Appeals adopted an argument that the government raised for the first time on appeal: that, since the conspiracy to defraud the United States charged in Count One (under 18 U.S.C. §371) alleged as objectives the impairment of the Internal Revenue Service's functions with respect to (a) ascertaining, computing, assessing and collecting revenue, namely income taxes; and (b) collecting information regarding transactions in United States currency in excess of $10,000, "the substantive crime of structuring under §371 was not a necessary predicate of the conspiracy charge[,]" and, consequently, the conspiracy conviction was not voided by this Court's subsequent decision in *Ratzlaf*, which had invalidated petitioners' structuring convictions. Appendix A at 11a (60 F.3d at 953).

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[1] In *Yates*, *supra*, this Court declared that "the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." 354 U.S. at 311-12. *Griffin* explained that the above-described rule applies only when the infirmity is *legal* rather than *evidentiary* in nature. 502 U.S. at 52-59.

In so doing, the Court of Appeals, without distinguishing, or even *mentioning* this Court's defining decision in *Griffin*, effectively eviscerated it in the context of conspiracy prosecutions instituted under §371's "conspiracy to defraud the United States" prong, even though *Griffin* itself was a prosecution under that very clause. 502 U.S. at 47, 55-58.

The Court of Appeals' decision creates a distinction that does not exist, since the objective of a multi-object conspiracy to defraud the United States certainly is not mutually exclusive of, and indeed often incorporates, the substantive offenses charged elsewhere in the same indictment. Thus, the mere fact that a §371 "conspiracy to defraud" charge does not *require* the enumeration or commission of a substantive offense, that does not at all mean that the substantive offenses in the indictment do not also reflect the objectives of the "conspiracy to defraud".

Moreover, *Griffin*'s rule that general verdicts that may have been based on legally invalid grounds cannot stand has been applied not just strictly to the "objects" of a conspiracy, but also to the essential evidentiary underpinnings. In *United States v. Harris*, 27 F.3d 111, 133-14 (4th Cir. 1994), the Fourth Circuit held that the possibility that the jury based its verdict (on one of the conspiracy's objects) on unconstitutionally obtained and introduced evidence invalidated the conspiracy conviction.

Surely, as the record set forth below demonstrates, here the objectives of the conspiracy corresponded directly to the substantive offenses charged in the Indictment, including the "structuring" charges that were subsequently invalidated due to the legal deficiency in the jury instructions. In failing to recognize that fact, the Court of Appeals' decision below

circumvents this Court's dictates in *Griffin*, and threatens to provide a convenient means for evading *Griffin*'s clear rule in the context of "conspiracy to defraud" cases in which the invalidation of substantive offenses, on legal grounds, requires vacatur of the conspiracy conviction.

Indeed, here, "structuring" was designated by the Indictment, by the government in its presentation and arguments to the jury, and by the District Court in its charge to the jury, as an objective of the conspiracy, and not just, as the Court of Appeals mistakenly characterized it, a "means to an end." Appendix A at 12a (60 F.3d at 953).

Plainly, the "structuring"offenses comprised a basis for the jury to find the existence of the charged conspiracy's second alleged illegal objective: impairment of the Internal Revenue Service's functions with respect to collecting information regarding transactions in United States currency in excess of $10,000.

For example, at ¶ 10, the Indictment defined "structuring", which describes the criminal offense proscribed in 31 U.S.C. §5324 (which was charged and further described later as "structuring" in the counts alleging that as a substantive offense). Also, at ¶ 23, as part of the conspiracy count, the Indictment charged that

> [i]t was further part of this conspiracy that the defendants HAROLD WAPNICK, SETH WAPNICK and JON WAPNICK, for the purpose of evading the CTR reporting requirements of Title 31, Code of Federal Regulations, would then "structure" currency transactions at the Republic Bank by writing multiple checks to "cash" in amounts under

> $10,000, and then withdraw the cash from "nominee" bank accounts.

In its presentation to the jury, the government reinforced the importance of the "structuring" allegations to the conspiracy's second alleged objective. For example, in its summation, the government argued

> the evidence and facts and circumstances of this case only prove the real importance of filing CTRs with the IRS and *how structuring to avoid these filing requirements can impair and impede the IRS in discovering financial information and assuring compliance with the revenue laws.*

Tr. 10,158 (6/17/93) (emphasis added).[2]

That, simply, represents a restatement of the second alleged objective of the charged conspiracy, with "structuring" identified as the critical element. Thus, the government certainly treated "structuring" as an objective of the conspiracy, both in the Indictment and its arguments to the jury. Indeed, the government would have undoubtedly argued the converse of petitioners' claim: if the "structuring" were all that survived (and not the tax preparation and CTR-based prongs of the conspiracy), the government would unquestionably assert that the "structuring" alone was sufficient to sustain the second alleged illegal objective of the conspiracy.

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[2] "Tr." refers to the transcript of petitioners' trial in the District Court. The parentheses indicate the date of the particular trial proceedings.

Moreover, the District Court's instructions to the jury further confirmed that the "structuring" allegations, as well as the other substantive offenses charged, were interchangeable with the conspiracy's alleged objectives. After reading essentially the entirety of the conspiracy count from the Indictment, the District Court next listed the "substantive crimes" in the Indictment, including "structuring of currency transactions", *id.*, and instructed the jury that

> [y]ou may find the defendants guilty of the crime of conspiracy to defraud the United States even though the *substantive crimes which were the objects of the conspiracy were not actually committed.*

Tr. 10,531 (6/21/93) (emphasis added).[3]

Thus, the jury charge, as well as the government, viewed the substantive offenses as substitutes for the "objects" of the charged conspiracy. In fact, that is precisely the way the government presented the issue to the jury at

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[3] Explaining further, the District Court advised the jury that

> [i]f . . . you find beyond a reasonable doubt that the minds of at least two of the alleged conspirators met in an understanding and that they agreed . . . to work together in furtherance of the unlawful schemes alleged in the indictment, then proof of the existence of the conspiracy is complete.

Tr. 10,534 (6/21/93).

trial. For instance, in its opening statement, the government stated,

> [t]his scheme to defraud and to fool the IRS had a number of parts to it and various parts are reflected in the substantive counts of the indictment which follow the conspiracy count that you heard about.

Tr. 59 (3/30/93).

Consequently, regardless whether a §371 conspiracy *requires* the commission of a substantive offense (or the attempt to do so), *in this case* the Indictment charged, the government prosecuted, and the District Court charged the jury that the objects of the conspiracy were synonymous with the substantive offenses that directly paralleled those conspiratorial objectives.

Notwithstanding the clear record, and the clear result dictated by this Court's decision in *Griffin*, the decision below ignored *Griffin*, and instead relied on the Seventh Circuit's decision in *United States v. Jackson*, *supra*, as well as on its own conclusion that its "reading of the record [did] not persuade [the Court of Appeals] that the district court and the government effectively amended the indictment by permitting the jury to find structuring to be an end, rather than a means to an end, of the conspiracy." Appendix A at 12a (60 F.3d at 953).

However, *Jackson* did not, as the Court of Appeals contended in its opinion below, present a "virtually identical argument" to that raised here. Appendix A at 11a (60 F.3d at 953).. In *Jackson*, the Seventh Circuit merely reiterated that §371 "does not *require* that the government prove a violation

of a separate substantive statute[,]" 33 F.3d at 870 (citations omitted) (emphasis in original), and noted that in *Jackson* neither the indictment nor the government identified the substantive violation as an objective of the conspiracy..

Indeed, the defendant in *Jackson* did not even raise the issue raised here: that the jury *could have* relied on the invalidated structuring charges. Instead, the defendant argued that the conspiracy conviction "*necessarily* was predicated on violations of the antistructuring laws." 33 F.3d at 869 (emphasis added). In *Jackson*, since the language in the Indictment (or, presumably, the government's theory and argument, and the District Court's charge) did not refer to "structuring", or to Title 31 violations, the defendant's claim could not prevail. 33 F.3d at 869.

Thus, in contrast to this case, in *Jackson* the Seventh Circuit did not sustain a conspiracy in which the Indictment, the government's theory, and the charge to the jury all incorporated the substantive offense allegations into the objectives of the conspiracy to defraud. Indeed, for that reason *Jackson* does not even discuss the long line of cases that culminated in this Court's decision in *Griffin*, which directs that a conviction for a multi-object conspiracy must be vacated when the substantive offenses underlying one of the illegal objects are subsequently found legally deficient. 502 U.S. at 52-59.

Nevertheless, in its decision below here, the Court of Appeals repeated *Jackson*'s omission of *Griffin*, but did so under circumstances that were not only very different from those in *Jackson*, but also that were controlled by the

inescapable rule explained in *Griffin*.[4]

The decision below, by skirting the principle underlying *Griffin*, *Yates*, and *Stromberg*, was also able to ignore another crucial aspect of those three cases: that a conspiracy conviction is *presumed* invalid when one of its objects is deemed legally deficient, and the defendant need not establish that the jury necessarily relied on that invalid object.

As this Court explained in *Griffin*, quoting from *Yates*, which in turn cited *Stromberg*,

> the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.

502 U.S. at 52, *quoting* 354 U.S. at 311-12, *in turn citing* 283 U.S. at 367-68 (other citations omitted).

Thus, the mere existence of valid grounds, and the possibility that the jury could have relied on them, is insufficient to sustain a conspiracy conviction. Here, one of

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[4] Certainly, *Jackson* was not intended to authorize wholesale evasion of *Griffin*; it merely did not, unlike this case, involve arguments and facts that implicated *Griffin*. Indeed, the Seventh Circuit has recently demonstrated that it understands the meaning and applicability of *Griffin* in appropriate cases. *See United States v. Briscoe*, 65 F.3d 576, 584-85 n. 9 (7th Cir. 1995).

the conspiracy's objectives -- the "structuring"-- was legally insupportable, and it is "impossible to tell" whether the jury relied on that invalid ground.

Therefore, it is respectfully submitted that this Court should grant certiorari in order to prevent this circumvention of the important principle enunciated in *Griffin* and the line of cases upon which it relies.

II

THE COURT SHOULD DECIDE WHETHER PETITIONERS' CONDUCT REQUIRED THE FILING OF CURRENCY TRANSACTION REPORTS PURSUANT TO 31 U.S.C. §5313(a)

Petitioners were also charged with multiple substantive violations of 31 U.S.C. §5313(a), namely, the failure to file a Currency Transaction Report ("CTR") for transactions "in connection with the exchange of United States Currency in excess of" $10,000. Seth Wapnick was convicted of 24 of the CTR counts, and Jon Wapnick was convicted of 71 CTR counts.

However, because the conduct alleged did not constitute an offense under §5313(a), it is respectfully submitted that this Court should grant certiorari to determine the important question of the breadth of §5313(a) and its attendant regulations.

As the evidence at trial established, the transactions that were the subject of the CTR counts proceeded in four steps: (1) a third-party businessman provided petitioners' father, Harold Wapnick, or his surrogate a check made out to (or, in limited instances, from) that third-party's business

entity; (2) that check was deposited in one of the 13 corporate bank accounts maintained by Harold Wapnick at Republic National Bank; (3) subsequently, checks were drawn on those 13 accounts, and cashed at Republic Bank;[5] and (4) the cash, in amounts in excess of $10,000, was delivered to the third-party businessman.

The government conceded that the first three steps did not require defendants to file a CTR,[6] but argued that petitioners were obligated to file a CTR for the fourth step: the delivery of the currency to the third-party businessmen. However, as detailed below, there is not any basis in the statute or the regulations for that proposition; indeed, the facts of this case appear to be unlike any other prosecuted under §5313(a).

It is axiomatic under §5313(a) and the accompanying regulations [found at 31 C.F.R. §103.11 *et seq.*] that "only financial institutions are required to file CTRs for transactions involving more than $10,000." *United States v. Tota*, 672 F. Supp. 716, 719 (S.D.N.Y. 1987), *citing California Bankers Ass'n v. Shultz*, 416 U.S. 21, 58, 94 S. Ct. 1494, 1516 (1974).

Here, the government relied on the definition of a "financial institution" in 31 C.F.R. §103.11(i)(3): "[a]

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[5] It was this step that formed the basis for the "structuring" charges, the convictions for which, as discussed *ante*, in POINT I, were vacated as a result of this Court's intervening decision in *Ratzlaf v. United States*, ___ U.S. ___, 114 S. Ct. 655 (1994).

[6] In fact, Republic Bank filed CTR's when the checks from the 13 accounts were cashed.

currency dealer or exchanger, including a person engaged in the business of a check casher." A "currency dealer or exchanger" is further defined in §103.11(f) as "[a] person who engages as a business in dealing in or exchanging currency, except for banks which offer such services as an adjunct to their regular business." A "check casher" is not further defined in the regulations.

Petitioners here were not acting in either capacity.[7] Certainly petitioners did not "cash checks"; rather, indisputably, the bank performed that function when it cashed the checks drawn on the 13 corporate accounts. Indeed, the bank, pursuant to its statutory duty, filed CTR's for these transactions. Thus, the only "check cashing" activity was performed by the bank, and was accompanied by the filing of CTR's.[8]

Just as surely, petitioners were not "dealing in currency" merely by passing in excess of $10,000 to the third parties. Otherwise, the simple payment of more than $10,000 would require the filing of a CTR by the payor, when, in fact, the applicable regulations require only that the *payee* file a Form 8300 [pursuant to 26 U.S.C. §6050(I)]. Likewise,

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[7] Below, the government essentially argued that Seth and Jon were not "financial institutions", but that they aided and abetted *Harold* Wapnick -- who they allege was a "financial institution" -- in evading the CTR requirements. For purposes of argument, this point will not distinguish among the defendants with respect to their status.

[8] Bank customers are not obligated to file CTR's for their transactions with banks. *See United States v. Scanio*, 900 F.2d 485, 488 (2d Cir. 1990).

there is not any provision in the regulations that requires persons (like petitioners) who cash checks in excess of $10,000 at a bank to file a CTR simply because that cash is subsequently delivered to another person. If the definition of "dealing in currency" is that broad, then it is without *any* limits, and defies any definition at all.

The cash that the third-party businessmen received from the petitioners represented money that had been paid by check to the business entities those third-party businessmen represented, and/or which was ultimately received and spent by those entities. As a result, the third-party businessmen were required, under 26 U.S.C. §6050(I), to file a Form 8300, which obliges the *recipient* of more than $10,000 in cash "received in a trade or business" to report that transaction. There is not any requirement that the *payors* such as petitioners in such a transaction file a Form 8300, or any other reporting form.

In fact, the instructions for the Form 8300 include within the definition of "Transaction" "the receipt and conversion of cash to a negotiable instrument (*e.g., a receipt of cash from a person in exchange for a check*)." (Emphasis added). That is precisely the type of transaction the government alleges occurred here.

Thus, since the third-party businessmen received from petitioners more than $10,000 in their "trade or business", the appropriate reporting instrument was a Form 8300, and petitioners were not required to file a CTR for the transaction. *Cf. United States v. Gollott*, 939 F.2d 255, 258 (5th Cir. 1991) [31 C.F.R. §103.11(a)(1) does not "necessarily require[] every participant in a covered

transaction to file a CTR"].[9]

In addition, this case is not like others in which Courts have endorsed an expansive definition of "financial institution". Ordinarily, in a §5313(a) prosecution, a defendant's purpose is to turn *cash* into *checks*, not *vice versa*, as petitioners did here. *See, e.g., United States v. Tannenbaum*, 934 F.2d 8 (2d Cir. 1991). In *Tannenbaum*, as in other cases, the exchange of cash for checks was direct, and was accomplished without any bank involvement, or any CTR's being filed; nor was the cash generated at a bank. The purpose, indeed, was to transform the cash into checks independent of *any* banking transaction. 934 F.2d at 10. *See also United States v. Hernando Ospina*, 798 F.2d 1570, 1572-73, 1578-79 (11th Cir. 1986) (person who used cash to purchase cashier's checks in manner designed to evade CTR requirements was a "financial institution"); *United States v. Goldberg*, 756 F.2d 949, 951 (2d Cir.), *cert. denied*, 472 U.S. 1009 (1985) (defendants sought to convert cash directly into checks, and did so outside the auspices of any bank, and without any CTR's being filed); *United States v. Nersesian*, 824 F.2d 1294, 1313 (2d Cir.), *cert. denied*, 484 U.S. 958 (1987) (object of the charged scheme was to transform cash directly into money orders without triggering the filing of a CTR).[10]

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[9] Petitioner Seth Wapnick's trial counsel raised this issue periodically at trial, and attempted to cross-examine expert witnesses on the issue.

[10] While in *United States v. Hawley*, 855 F.2d 595 (8th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989), the defendants received checks and returned cash, the rationale under which the defendants in *Hawley* were categorized as a

The interpretation of "financial institution" in those cases makes sense, since applying §5313(a) and the accompanying regulations to instances in which cash is transformed into checks or other monetary instruments is consistent with the purpose of the statute: to prevent the unmonitored conversion of large cash proceeds of illegal activity into other financial instruments. *See*, e.g., *United States v. Goldberg*, *supra*, 756 F.2d at 954.[11]

Here, in contrast, the checks received by petitioners were *not* the proceeds of a crime (indeed, the majority of the third-party businessmen's checks had invoice numbers reflecting legitimate work performed by the payees, while others were expended on legitimate business deductions); nor was the cash the third-party businessmen received. Indeed, the cash was generated not by illegal activity, but by the bank.

"financial institution", and under which they were convicted, was that they constituted a "private bank" under 31 C.F.R. §§103.11(i)(1) & 103.11(b)(2). 855 F.2d at 600-01. Here, below, the government also sought to characterize petitioners as a "private bank", but the District Court rejected that construction.

[11] Even the one case that involved more than a one-step transaction, *United States v. Torres Lebron*, 704 F. Supp. 332, 333 (D.P.R. 1989), still involved the effort to convert cash to a negotiable instrument without any bank involvement, and without any CTR's being filed in the process. In *Torres Lebron*, the defendants brought more than $1 million in cash to a bank, where, with the collusion of bank employees and without any CTR's being filed, it was first converted into prize-winning Puerto Rico lottery tickets, which then were used to purchase Certificates of Deposit.

Of course, petitioners' only transaction at the bank -- turning checks into cash -- was accompanied by the bank's filing a CTR. Indeed, in this case, the government conceded that it could not connect a single third-party businessman's check with a specific check cashed at the bank, as it admitted to the District Court that it was "not attempting to make the direct link and say this specific lump of cash went to this specific check-cashing operation." Tr. 328 (5/13/93); 7609 (5/27/93).

Thus, the event that the government insists required the filing of a CTR -- the simple transfer of currency from petitioners to the third-party businessmen, after the bank had already filed a CTR attendant to the generation of the cash -- constituted neither "check cashing" or "dealing in currency" under the regulations. Consequently, the conduct engaged in by petitioners did not require the filing of a CTR, and did not violate §5313(a).

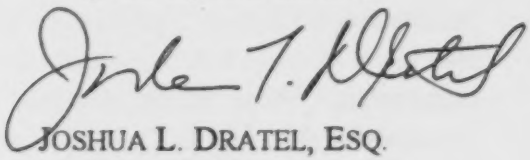
Accordingly, it is respectfully submitted that this Court should grant certiorari to circumscribe the ambit of the statute and regulations accordingly.

CONCLUSION

Therefore, for all the reasons set forth above, it is respectfully submitted that this Court should grant a writ of certiorari to (a) vindicate the important rule set forth in *Griffin*; and (b) determine the scope of 31 U.S.C. §5313(a) as it relates to petitioners' conduct.

Dated: 1 January 1996
New York, New York

Respectfully submitted,



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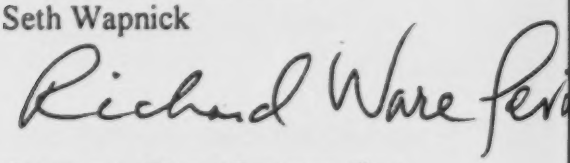

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 647, 1305, 648, 544—August Term 1994

Argued: April 11, 1995 Decided: July 10, 1995

Docket Nos. 94-1206, 94-1207, 94-1208, 94-1209

UNITED STATES OF AMERICA,

Appellee,

—v.—

SETH WAPNICK, HAROLD WAPNICK, JON WAPNICK, and STEVEN WOLFSON,

Defendants-Appellants.

Before:

FEINBERG, WALKER and CABRANES,

Circuit Judges.

Appeal from convictions by a jury in the United States District Court for the Eastern District of New York (Carol Bagley Amon, *Judge*) for conspiracy to defraud

the United States by impeding the lawful functions of the Internal Revenue Service, and aiding and abetting the filing of false tax returns. In addition, Harold, Jon and Seth Wapnick appeal from their convictions for failure to file Currency Transaction Reports as required by law; Harold Wapnick appeals from his conviction for tax evasion; and Seth Wapnick appeals from his conviction for making false statements on his tax returns.

Affirmed.

JOSHUA L. DRATEL, New York City (Lefcourt & Dratel, P.C., Gerald B. Lefcourt, of counsel) *for defendant-appellant Seth Wapnick.*

RICHARD WARE LEVITT, New York City, *for defendant-appellant Jon Wapnick.*

BARRY GENE RHODES, Brooklyn, New York, *for defendant-appellant Steven Wolfson.*

HAROLD WAPNICK, *pro se.*

SHARI D. LEVENTHAL, Assistant United States Attorney, Brooklyn, New York (Zachary Carter, United States Attorney, Eastern District of New York, Emily Berger, Thomas H. Roche, Assistant United States Attorneys, Brooklyn, New York, of counsel), *for appellee.*

JOSÉ A. CABRANES, *Circuit Judge:*

Appellants Seth Wapnick, Harold Wapnick, Jon Wapnick, and Steven Wolfson appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York (Carol Bagley Amon, *Judge*). The jury convicted all four appellants of conspiracy to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service ("IRS") in collecting income taxes and information regarding cash transactions in excess of $10,000, in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 3623; all four appellants of aiding and abetting the filing of false tax returns, in violation of 26 U.S.C. § 7206(2); Harold, Jon and Seth Wapnick ("the Wapnicks") for failing to meet reporting requirements for large cash transactions, in violation of 31 U.S.C. §§ 5313, 5322(b); Harold Wapnick of tax evasion, in violation of 26 U.S.C. § 7201; and Seth Wapnick of making false statements on his tax return, in violation of 26 U.S.C. § 7206(1) and 18 U.S.C. § 3623. The Wapnicks were also convicted of structuring transactions to evade currency transaction reporting requirements, in violation of 31 U.S.C. § 5324, but the district court set aside those convictions prior to sentencing in light of the Supreme Court's holding in *Ratzlaf v. United States*, 114 S. Ct. 655, 663 (1994).

Appellants challenge their convictions and sentences on multiple grounds. We find their arguments to be without merit, and we affirm the judgments of conviction as well as the sentences imposed by the district court.

I

Harold Wapnick, an accountant, operated a tax preparation service called Harold Wapnick & Sons ("the Wapnick business") out of the basement of his home in Brooklyn. The Wapnick business employed Harold Wapnick's sons, Jon and Seth, and Steven Wolfson. A large number of appellants' clients were taxicab operators, including many self-employed immigrant cab drivers. Appellants grew to be a major force in the New York taxi industry, and at one time prepared the tax returns for an estimated 13% of the city's cab drivers—a large number of them immigrants from Haiti, Russia, Israel and other countries. *See* N.R. Kleinfield, *Pursuing Tax Cheats in Land of Opportunity,* N.Y. TIMES, June 16, 1993, at A1, *in* Gov't App. 235.

A

In the spring of 1988, the Finance Department of the City of New York began investigating allegations that the tax returns prepared by the Wapnick business on behalf of their taxi clients were fraudulent. As part of the city probe, city investigator Joseph McQuillen worked as an undercover cab driver and, appropriately "wired," visited the Wapnick business. There, McQuillen told defendants that he had received a notice from the city requesting taxes due, and that he had not filed any tax returns for the 1985, 1986 or 1987 tax years. The Wapnick business subsequently prepared tax returns for McQuillen for those years, without asking McQuillen about his fares, tips and expenses for those years.

In November 1988, McQuillen told defendants that he had received a notice of hearing from the City and

feared a tax return audit. Harold and Jon Wapnick reportedly advised McQuillen to purchase a diary and fabricate maintenance expenses; further, Jon Wapnick allegedly told McQuillen to spill coffee on the diary and scuff it in order to make it appear authentic.

Approximately one month later, IRS agent Kevin Carroll applied for a warrant to search the basement office of the Wapnick business, in support of which Carroll submitted an eleven-page affidavit that reported McQuillen's account of his undercover dealings with appellants and stated also that the Wapnicks' own tax returns appeared to understate their reported gross incomes. Then-Magistrate Judge Allyne Ross issued a warrant for "the basement office of 2024 East 18th Street, Brooklyn, New York," authorizing seizure of a detailed list of items. Pursuant to the warrant, on December 15, 1988, IRS agents searched the basement office of the Wapnick business, seizing a computer and approximately one million documents.

In April 1992, United States Attorney Andrew Maloney and New York City Mayor David Dinkins made a joint appearance at City Hall to announce that defendants had been named in a 152-count indictment charging them with numerous federal crimes arising out of the activities of their tax preparation business. *See* Dan Jacobson, *Tax Preparers Accused in Tax Scam*, UPI, Apr. 9, 1992.

Prior to trial, Jon and Seth Wapnick moved to have the evidence seized in the December 1988 search and seizure suppressed on multiple grounds. In an opinion dated March 15, 1993, the district court denied the motion to suppress.

B

Appellants' trial began March 29, 1993, and lasted thirteen weeks. More than seventy witnesses testified for the government, including clients of the Wapnick business, expert witnesses, and McQuillen, the undercover city investigator. The government sought to establish at trial that (1) all four appellants participated in aiding and abetting their clients in filing false tax returns that understated their clients' income; (2) Harold Wapnick evaded tax liability by employing sham corporations to conceal income generated by business activity of the Wapnick family; (3) Seth Wapnick understated his own business income on his tax returns; and (4) Harold, Seth and Jon Wapnick failed to file required reports for cash transactions exceeding $10,000, and structured their cash transactions to evade those reporting requirements.

1. The Preparation of False Tax Returns for Taxi Clients

At trial, McQuillen testified about his undercover dealings with the Wapnick business, stating that appellants had prepared his tax returns with fabricated information. Twelve self-employed cab drivers gave similar accounts on the stand, testifying that appellants had prepared their tax returns without the benefit of any information about their fares, tips or expenses. Two drivers and McQuillen testified that appellants coached them on how to fabricate diaries to substantiate the false tax returns.

The returns prepared by the Wapnick business, according to witness testimony, grossly understated the taxi drivers' fare income by claiming that mileage registered on the drivers' meter boxes was actually run up by oth-

ers to whom the drivers leased the cabs—even though the drivers testified that they had never leased their cabs to anyone, nor told appellants that they had done so.

2. Harold Wapnick's Tax Evasion Scheme

Tax returns filed by Harold Wapnick on behalf of the Wapnick business reported taxable income of $5,460 in the 1985 tax year, and $5,908 in 1986. Harold Wapnick did not file a return for the 1987 tax year. The government sought to show at trial that these returns vastly underreported the true income generated by the Wapnick tax preparation service and by a loan and check-cashing business conducted on the side by Harold, Seth and Jon Wapnick. According to government testimony, Harold Wapnick concealed the income derived from the loan and check-cashing businesses by depositing the revenues into thirteen different corporate accounts at Republic National Bank employing unauthorized employer identification numbers belonging to former clients of the tax preparation business. Government witnesses testified that Harold Wapnick's unreported income from accounting fees, check-cashing fees, interest income and capital gains totalled $600,515 in 1985, $787,080 in 1986, and $1,008,325 in 1987.

3. Seth Wapnick's False Tax Returns

Seth Wapnick had a business activity of his own—leasing taxi medallions—and was also understating his income on his tax returns, government witnesses testified. According to the government's evidence, Seth Wapnick leased the medallions using three corporations in which he was a shareholder,[1] none of which filed any

[1] These corporations were the Centurion Taxi Inc., Macar Service Corporation, and Canary Transportation Corporation. Each corporation had

corporate tax returns for the 1986 or 1987 tax years. According to the government, Seth Wapnick's actual income from medallion-leasing was $9,862 in the 1986 tax year, and $21,184 in 1987. His tax returns, however, understated this income by 57% in 1986, and by 59% in 1987.

4. The Money Laundering Scheme

Financial institutions are required by law to file currency transaction reports ("CTRs") with the Secretary of the Treasury in connection with transactions involving more than $10,000 in United States currency. 31 U.S.C. § 5313(a) (prescribing the filing of CTRs for currency transactions exceeding an amount set by regulation); 31 C.F.R. § 103.22(a) (1986); *id.* (1987) (setting amount at $10,000). Witnesses for the government testified that the Wapnick business routinely cashed checks in amounts exceeding $10,000; yet the Wapnicks never filed any CTRs concerning those transactions.

To fund their loan and check-cashing operations, the Wapnicks frequently made large cash withdrawals from their numerous Republic National Bank accounts. According to the testimony of a bank employee, the Wapnicks would make multiple withdrawals in the same day, invariably totalling more than $10,000, but in sums of just under $9,500 at a time. To break large transactions into smaller ones of less than $10,000 for the purpose of evading CTR requirements—a practice commonly known as "structuring"—is illegal under 31 U.S.C. § 5324. Bank supervisors began taking note of the Wapnicks' withdrawal pattern, and, believing it to be suspicious, began to file CTRs for those transactions.

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a second shareholder in addition to Seth Wapnick. Jon Wapnick was a shareholder in Centurion and Macar, and Martin Fineman was a shareholder in Canary.

C

On June 25, 1993, the jury convicted all four defendants of conspiracy to defraud the United States, and of several counts of aiding and abetting the filing of false tax returns. The jury also convicted Harold, Jon and Seth Wapnick of failing to file CTRs and of structuring transactions to evade reporting requirements; Harold Wapnick of tax evasion; and Seth Wapnick of making false statements on his tax returns.

Following the jury verdict but prior to sentencing, the Supreme Court held that in order for a defendant to be convicted of structuring under 31 U.S.C. § 5324, a jury had to find that the defendant acted with knowledge that the conduct was unlawful. *Ratzlaf*, 114 S. Ct. at 663. Inasmuch as the Wapnick jury had not been instructed that awareness of illegality was a necessary predicate for a structuring conviction—though the instructions were consistent with the law of the Circuit prior to *Ratzlaf*—the district court set aside the Wapnicks' structuring convictions.

On March 25, 1994, the district court sentenced Harold Wapnick to 66 months' imprisonment; Jon and Seth Wapnick to concurrent terms of 33 months; and Wolfson to concurrent terms of 24 months. In addition, all the appellants were fined, required to pay special assessments, and sentenced to three years of supervised release.

II

As noted above, the Wapnicks were convicted of structuring under 31 U.S.C. § 5324, but the district court vacated these convictions in light of the Supreme Court's

holding in *Ratzlaf*. On appeal, the Wapnicks attempt to use the vacatur of their structuring convictions to attack their convictions on other counts. First, they argue that *Ratzlaf* also compels vacatur of their conspiracy convictions, on the theory that the jury's finding of guilt on the conspiracy counts might have been dependent on the structuring convictions. Second, they argue that the prejudicial spillover from the vacated structuring charges tainted various of the remaining substantive counts, compelling vacatur of those as well. In our view, neither argument is availing.

A

Pursuant to 18 U.S.C. § 371, it is illegal to participate in a conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose." The relevant portion of the indictment charges that the Wapnicks conspired

> to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service of the U.S. Treasury Department in its authorized functions of (a) ascertaining, computing, assessing and collecting revenue, namely income taxes, and (b) collecting information regarding transactions in United States currency in excess of $10,000.

The Wapnicks argue on appeal that the Supreme Court's decision in *Ratzlaf* compels the vacatur of not only their structuring convictions, but their conspiracy convictions as well.[2] Since one of the objects of the conspiracy, as

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[2] Jon and Seth Wapnick press this point in their main brief. Harold Wapnick does not make the argument in his *pro se* main brief, but joins his sons' argument in his reply brief.

specified in the indictment, was to impair the IRS's ability to collect information on cash transactions exceeding $10,000, the Wapnicks contend that the jury might have been led to believe that a finding of guilt on the structuring count would also compel a finding of guilt on the conspiracy charge. Put another way, the Wapnicks' theory is that their § 371 conspiracy convictions might have been premised on violations of the structuring laws. We disagree.

The Seventh Circuit recently considered a virtually identical argument in *United States v. Jackson*, 33 F.3d 866 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1316 (1995), holding that a conspiracy conviction under § 371 does not require that the government prove a violation of a separate substantive statute. *Id.* at 870. The government may *allege* the violation of a substantive statute in support of a § 371 conspiracy charge, "but such an allegation is only 'a way of consummating the conspiracy . . . which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense.' " *Id.* (quoting *Glasser v. United States*, 315 U.S. 60, 67 (1942)).

We believe that *Jackson* is correctly decided and applicable to the case before us. The text of the conspiracy indictment in *Jackson*, 33 F.3d at 689, is nearly identical to the indictment in the present case. In both indictments, impairing the IRS's ability to collect information about cash transactions exceeding $10,000 was listed as an object of the charged conspiracy. And in both cases, the substantive crime of structuring under § 371 was not a necessary predicate of the conspiracy charge.

Seth and Jon Wapnick attempt to distinguish *Jackson*, claiming that, even though the indictment did not specify the substantive crime of structuring as an object of the § 371 conspiracy, the government's argument and the jury charge permitted the jury to find that structuring was not only a *means* to the end of fraud, but that it was the fraud itself. However, our reading of the record does not persuade us that the district court and the government effectively amended the indictment by permitting the jury to find structuring to be an end, rather than a means to an end, of the conspiracy.

B

Jon and Seth Wapnick next argue that the structuring violations were inextricably intertwined with the CTR violations under 31 U.S.C. §§ 5313, 5322(b), and the tax-based counts—and thus the vacated structuring conviction prejudiced the jury's consideration of the other counts. In light of the manner in which the government grouped the counts and presented its case at trial, Jon and Seth Wapnick argue, the government's case as to the structuring counts infected the other related counts and rendered the jury unable to separate the different counts. Thus, they argue, the convictions on all counts that might have been tainted by the structuring conviction should be set aside.

In assessing a claim of prejudicial spillover from dismissed counts, this Circuit looks to several factors in determining "whether the totality of the circumstances requires reversal of some or all of the remaining counts." *United States v. Rooney*, 37 F.3d 847, 855 (2d Cir. 1994). First, we look at whether the evidence on the vacated count was of such an "inflammatory" nature, *United*

States v. Friedman, 854 F.2d 535, 582 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989), that it "would have tended to incite or arouse the jury into convicting the defendant on the remaining counts." *Rooney*, 37 F.3d at 855. We find no evidence in the record that the government's evidence of the Wapnicks' alleged structuring activities was "of the sort to arouse a jury," *United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983), nor do we find anything in the record indicating that the jury was likely to give the structuring evidence disproportionate weight in their deliberations on the remaining counts. Structuring was a relatively minor part of the government's case at trial, taking up less than three days of testimony in the three-month span of the trial.

Second, we look at whether the evidence and facts pertaining to the structuring count are similar to or different from those relating to the other counts. *Rooney*, 37 F.3d at 855. In cases where the vacated and remaining counts emanate from similar facts, and the evidence introduced would have been admissible as to both, it is difficult for a defendant to make a showing of prejudicial spillover. *United States v. Bailey*, 859 F.2d 1265, 1273 n.1 (7th Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989); *United States v. Odom*, 858 F.2d 664, 666-67 (11th Cir. 1988). By the same token, where the vacated and remaining counts arise out of completely distinct fact patterns, and the evidence as to both counts is readily separable, there is also no prejudicial spillover. *Rooney*, 37 F.3d at 856; *United States v. Pelullo*, 14 F.3d 881, 898 (3d Cir. 1994). Thus, a defendant is likely to make a successful argument of prejudicial spillover

> only in those cases in which evidence is introduced on the invalidated count that would otherwise be inadmissible on the remaining counts, *and* this evi-

> dence is presented in such a manner that tends to indicate that the jury probably utilized this evidence in reaching a verdict on the remaining counts . . . .

Rooney, 37 F.3d at 856.

In the case before us, the charges of structuring and of failing to file CTRs were distinct and separable. The immediate transactions underlying each charge were distinct: The transactions underlying the structuring counts were the Wapnicks' multiple cash withdrawals of amounts just under $10,000 from Republic National Bank; by contrast, the transactions underlying the CTR charges were the Wapnicks' cashing of their customers' unendorsed, third-party checks in amounts exceeding $10,000. Further, the Wapnicks make no showing that the evidence relating to the structuring counts would have been inadmissible had they not been charged with structuring in the first place. *See id.* In light of our finding that the two counts were factually distinct and that the evidence adduced in support of each count could be compartmentalized, "we normally will have undiminished faith that a jury has followed the court's instructions and has evaluated each count on the specific evidence attributed to it." *Id.* This conclusion is bolstered by Judge Amon's charge to the jury on the CTR count, in which she made no reference to structuring.

Third, we make a general assessment of the strength of the government's case on the remaining counts. *Rooney*, 37 F.3d at 856; *United States v. Gjurashaj*, 706 F.2d 395, 400 (2d Cir. 1983). Based on our review of the trial transcript, we conclude that the government's case as to the CTR and tax-based counts was sufficiently strong so that there was little or no likelihood that any prejudice from the structuring charge tainted the jury's

verdicts on the remaining charges. Thus, we conclude that the presence of the vacated structuring count did not result in or lead to "any spillover effect sufficiently prejudicial to call for reversal" of the remaining counts. *Ivic*, 700 F.2d at 65.

III

Appellants challenge many of the district court's instructions to the jury, including the instructions regarding the elements of a "sham corporation." The government alleged the existence of at least two sets of sham corporations: (1) the thirteen corporations through which Harold Wapnick established corporate accounts at Republic National Bank—through the unauthorized use of employer identification numbers of the Wapnick business's former tax clients—allegedly in order to evade both tax liability and CTR requirements; and (2) the three corporations through which Seth Wapnick leased taxicab medallions.

The district court's instruction to the jury on sham corporations[3] was based on criteria enumerated by Judge

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[3] The court's instructions to the jury on the elements of a sham corporation were as follows:

> It is your responsibility to judge the facts and determine whether the corporations created by [Harold Wapnick] were sham corporations, thereby entitling you to ignore the existence of these corporations in determining whether the government has proved the existence of a tax liability. To assist you in making this determination, I instruct[] you as follows:
>
> If a corporation is organized and established for a purpose that is the equivalent of a business activity or is followed by the carrying on of a business by the corporation, the corporation remains a separate taxable entity. As a separate taxable entity, it would be subject to corporate income tax on its income, and that income would not be included in the shareholder's income. In order to be a separate taxable

Learned Hand in *National Investors Corp. v. Hoey*, 144 F.2d 466, 468 (2d Cir. 1944). We hold that the instruction was not in error. The charge comported fully with *Hoey* and *Moline Properties, Inc. v. Commissioner of Internal Revenue*, 319 U.S. 436, 439 (1943) (defining separate taxable entities), and it was, contrary to Seth Wapnick's claims, neither "overly restrictive" nor "overwhelmingly prejudicial." Whether the corporations used by Harold and Seth Wapnick were actually shams was a question that was properly submitted to the jury. There was, in our judgment, sufficient evidence from which a jury could find the existence of sham corporations, viewing the evidence in the light most favorable to the government. *United States v. Puzzo*, 928 F.2d 1356, 1361 (2d Cir. 1991); *United States v. Badalamenti*, 794 F.2d 821, 828 (2d Cir. 1986).

Hence, we find that the district court did not err in its jury charge regarding the question of sham corporations.

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entity, a corporation must be established for a business purpose and must do business in the ordinary meaning of that term.

For a corporation to be considered a separate "person" for tax purposes, it must engage in some kind of industrial, commercial or other activity besides avoiding taxation. Thus, a corporation is not considered a separate taxable entity if it is merely a paper corporation, existing only to assist its owners or shareholders to avoid taxation.

In addition, if a corporation is so controlled by its owners and shareholders that it is being used by those shareholders to advance their own personal purposes rather than to achieve corporate goals, the corporation is said to be merely the alter ego of the shareholders. This is another way of saying that there is no separation between the corporation and its owners or shareholders. When, for example, owners or shareholders move their own funds in and out of a corporate account without any regard for which funds belong to the corporation and which belong personally to the corporation's owners, then a finding that the corporation is merely a sham corporation is proper. The corporation is not to be disregarded, however, merely because a shareholder maintains a detailed direction of corporate affairs.

Nor do we find error in any of the other jury instructions challenged by appellants.

IV

On appeal, Jon and Seth Wapnick attack Judge Amon's denial of their suppression motion prior to trial. Agent Carroll's affidavit in support of the search warrant alleged that investigator McQuillen had observed "what appeared to be a tax form on the screen of [a] computer" on the Wapnick business premises, and that McQuillen had overheard Seth Wapnick telling another client that all of the client's tax information was in the computer. However, as the government conceded at the suppression hearing, no such tax forms or records were found in the computer or on disks seized from the premises. Thus, appellants argue, in granting the application for a search warrant, the magistrate judge relied on false information in the affidavit, compelling suppression of the evidence.

In order to challenge successfully a search warrant based on an attack on the allegations in a supporting affidavit, a defendant "must show by a preponderance of the evidence that the affidavit contained false statements that were material on the issue of probable cause." *United States v. Ferguson*, 758 F.2d 843, 848 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985) (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). The defendant must further show that the alleged false statements were made "intentionally, knowingly, or with reckless disregard for the truth." *Id.* The district court held that there was no evidence that Agent Carroll either knew that the statements of Investigator McQuillen were false—if indeed they were false—or showed "reckless disregard for their

truth," when Carroll incorporated the statements into his affidavit in support of a search warrant.

The district court asserted, however, that if an *informant* knowingly or recklessly makes a false statement to an affiant, that does not present grounds to challenge the search warrant so long as the affiant in good faith accurately represents what the informant told him. Mem. and Order of Mar. 15, 1993, (citing *United States v. Navarro*, 767 F. Supp. 544, 547 (S.D.N.Y. 1991); *United States v. One Parcel of Property Located at 15 Black Ledge Drive*, 897 F.2d 97, 101 (2d Cir. 1990)). As a general rule, this is true when the informant is a private individual. However, when the informant is himself a government official, a deliberate or reckless omission by the informant can still serve as grounds for a *Franks* suppression. *United States v. DeLeon*, 979 F.2d 761, 764 (9th Cir. 1992) ("The Fourth Amendment places restrictions and qualifications on the actions of the government generally, not merely on affiants."). Otherwise, the government would be able to shield itself from *Franks* suppression hearings by deliberately insulating affiants from information material to the determination of probable cause. *Id.*

Nevertheless, we reject appellants' challenge of the district court's denial of their suppression motion. There is no evidence in the record that McQuillen knowingly or recklessly made false statements to Carroll in connection with Carroll's preparation of the affidavit. Even if appellants had made such a showing, a *Franks* hearing is required[4] only if, "with the affidavit's false material set to one side, the affidavit's remaining content is insuf-

[4] In any event, it should be noted that in an excess of caution, Judge Amon conducted a Franks hearing even though she doubted that it was required.

ficient to establish probable cause." *Franks*, 438 U.S. at 156. McQuillen's alleged false statement constituted only one paragraph of an eleven-page affidavit; even if that paragraph were redacted, the remainder of the affidavit provided ample probable cause for the search warrant and for the seizure of the computer.

We hold that appellants' other challenges to the district court's denial of the suppression motion are unavailing.

V

Appellants challenge their convictions, their sentences, and other rulings of the district court on multiple grounds in addition to the ones discussed above. We have considered them all, and we find them to be without merit.

For the foregoing reasons, we affirm the judgments of conviction against all appellants and the sentences imposed on them by the district court.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the **3RD** day of OCTOBER one thousand nine hundred and ninety-five.

USA

v. Docket No: 94-1206

Wapnick

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellants SETH and JON WAPNICK.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk
By:_____
Beth J. Meador,
Administrative Attorney

Dated: October 3, 1995

(2)

Supreme Court, U.S.
FILED
APR 5 1996
CLERK

No. 95-1103

In the Supreme Court of the United States

OCTOBER TERM, 1995

SETH WAPNICK AND JON WAPNICK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the vacatur of petitioners' convictions for substantive violations of the currency transaction reporting laws required the vacatur of their convictions for conspiring to defraud the United States.

2. Whether petitioners were required to file currency transaction reports in connection with their check-cashing business.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1103

SETH WAPNICK AND JON WAPNICK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 60 F.3d 948.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1995. A petition for rehearing was denied on October 3, 1995. Pet. App. 1b. The petition for a writ of certiorari was filed on January 2, 1996 (a Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioners were convicted of conspiring to defraud the United States by impeding

the lawful functions of the Internal Revenue Service, in violation of 18 U.S.C. 371; aiding and assisting the filing of false tax returns, in violation of 26 U.S.C. 7206(2); failing to meet reporting requirements for large cash transactions, in violation of 31 U.S.C. 5313 (1988) and 5322(b) (1988); and willfully structuring transactions to evade the currency transaction reporting requirements, in violation of 31 U.S.C. 5322(b) (1988) and 5324 (Supp. IV 1992). Pet. App. 3a; Pet. C.A. App. 92-94.[1] Petitioner Seth Wapnick was also convicted of making false statements on his tax return, in violation of 26 U.S.C. 7206(1). Pet. App. 3a, 6a.[2] The district court set aside the "structuring" convictions in light of this Court's intervening decision in *Ratzlaf* v. *United States*, 114 S. Ct. 655 (1994). Based on the remaining convictions, petitioners were each sentenced to serve 24 months' imprisonment, to be followed by three years' supervised release, and to pay a fine of $10,000. The court of appeals affirmed. Pet. App. 1a-19a.

1. Petitioners worked for a tax preparation service called Harold Wapnick & Sons, which was headed by their father and co-defendant, Harold Wapnick. The

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[1] Sections 5322(b) and 5324 (31 U.S.C.) were amended in 1994. See note 3, *infra*.

[2] Petitioners' co-defendants, Harold Wapnick and Steven Wolfson, were convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371, and aiding and assisting the filing of false tax returns, in violation of 26 U.S.C. 7206(2). Harold Wapnick was also convicted of failing to meet reporting requirements for large cash transactions, in violation of 31 U.S.C. 5313 (1988) and 5322(b) (1988); willfully structuring currency transactions to evade the reporting requirements, in violation of 31 U.S.C. 5322(b) (1988) and 5324 (Supp. IV 1992); and tax evasion, in violation of 26 U.S.C. 7201.

business prepared tax returns for a large number of New York City cab drivers. Petitioners and their co-defendants prepared numerous tax returns falsely understating the income of cab drivers and coached some drivers to falsify records to support the false returns. Pet. App. 4a-7a.

In addition to the tax preparation service, petitioners and Harold Wapnick conducted loan and check-cashing operations. In the latter venture, the Wapnicks routinely cashed third-party checks for more than $10,000, but they never filed currency transaction reports (CTRs) for those transactions. Pet. App. 7a-8a, 14a. Between 1984 and 1988, the Wapnicks cashed more than $6 million in checks. *Id.* at 7a; Gov't C.A. Br. 19-21, 52.

Harold Wapnick hid the income from the loan and check-cashing operations by depositing it in 13 corporate accounts at Republic National Bank. Pet. App. 7a. To fund the operations, the Wapnicks often in a single day made multiple withdrawals from the bank accounts that totaled more than $10,000 but were individually for lesser amounts. Although the individual withdrawals fell below the $10,000 amount prescribed by regulation, 31 C.F.R. 103.22(a), the suspicious nature of those withdrawals led bank officials to begin reporting them on CTRs. Pet. App. 8a.

Petitioner Seth Wapnick also operated a separate business that leased taxicab medallions. He underreported his income from that business on his federal income tax returns for 1986 and 1987. Pet. App. 7a-8a.

2. The district court instructed the jury that, with respect to the counts that charged petitioners with structuring transactions to evade the currency transaction reporting requirements, the jury should

find petitioners guilty if it found that they knew of those requirements and deliberately acted to evade them. Pet. C.A. App. 364-366. The court instructed the jury that it was not required to find that petitioners knew that structuring was unlawful. *Id.* at 365. After trial, the court set aside petitioners' convictions on the "structuring" counts in light of *Ratzlaf* v. *United States*, 114 S. Ct. 655 (1994), which held that, to satisfy the willfulness element of the offense in a structuring prosecution, the government must prove that the defendant knew that his conduct was illegal. Pet. App. 3a.[3] The district court did not, however, set aside petitioners' convictions for conspiring to defraud the United States by impeding the functions of the IRS.

3. The court of appeals affirmed. Pet. App. 1a-19a. As relevant here, it rejected petitioners' argument that *Ratzlaf* required the vacatur of not only their structuring convictions but also their convictions for conspiring to defraud the United States.[4] The court

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[3] In the wake of *Ratzlaf*, Congress amended 31 U.S.C. 5322(b) and 5324. See Act of Sept. 23, 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2253. Under the amended provisions, the government need not prove that the defendant in a structuring prosecution knew that his or her conduct was illegal. See *United States* v. *Zehrbach*, 47 F.3d 1252, 1261-1262 & n.7 (3d Cir.) (en banc), cert. denied, 115 S. Ct. 1699 (1995).

[4] In rulings that petitioners do not challenge in this Court, the court of appeals also held that the vacatur of petitioners' structuring convictions did not "taint[]" their convictions for failing to file CTRs in connection with their check-cashing business (Pet. App. 12a-15a); that the district court correctly instructed the jury on what constitutes a "sham corporation" (*id.* at 15a-16a); and that the evidence seized under a search warrant was properly admitted (*id.* at 17a-19a). The court of appeals rejected without discussion petitioners' remaining con-

observed that petitioners were not charged under 18 U.S.C. 371 with conspiring to commit a crime, but with conspiring to defraud the United States by "impair[ing] the [Internal Revenue Service's] ability to collect information on cash transactions exceeding $10,000." Pet. App. 11a.[5] In light of that charge, the court explained, the government was not required to prove a violation of the structuring provision. *Ibid.* The court accordingly held that the vacatur of the structuring convictions did not compel the vacatur of the conspiracy convictions. *Id.* at 11a-12a. In so holding, the court followed the Seventh Circuit's decision in *United States* v. *Jackson*, 33 F.3d 866 (1994), cert. denied, 115 S. Ct. 1316 (1995), which rejected an argument "virtually identical" to petitioners'. Pet. App. 11a.

The court of appeals rejected petitioners' assertion that, "even though the indictment did not specify the substantive crime of structuring as an object of the § 371 conspiracy, the government's argument and the jury charge permitted the jury to find that structuring was not only a *means* to the end of fraud, but that it was the fraud itself." Pet. App. 12a. The court stated: "[O]ur reading of the record does not persuade us that the district court and the government

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tentions, including their contention, which they renew in this Court (Pet. 17-23), that they were not required to file CTRs for their check-cashing operations. See Pet. App. 19a.

[5] Section 371 (18 U.S.C.) provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be [guilty of a crime] * * *.

effectively amended the indictment by permitting the jury to find structuring to be an end, rather than a means to an end, of the conspiracy." *Ibid.*

ARGUMENT

1. Petitioners contend (Pet. 3-4, 8-17) that *Ratzlaf* v. *United States*, 114 S. Ct. 655 (1994), required the vacatur of not only their structuring convictions but also their conspiracy convictions. They argue as follows: One object of the conspiracy with which they were charged was to violate the structuring statute; that object was legally insufficient in light of *Ratzlaf*; and under *Griffin* v. *United States*, 502 U.S. 46 (1991), a conspiracy conviction must be reversed when one of the charged objects is held to be legally insufficient.

The premise of petitioners' argument is mistaken. The object of the conspiracy with which they were charged was not to violate the structuring statute. Rather, the indictment charged that the object of the conspiracy was

> to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service of the U.S. Treasury Department in its authorized functions of (a) ascertaining, computing, assessing and collecting revenue, namely income taxes, and (b) collecting information regarding transactions in United States currency in excess of $10,000.

Indictment ¶ 12, at 4 (Pet. C.A. App. 69). Although the conspiracy count of the indictment also alleged that petitioners structured currency transactions with Republic National Bank in order to evade the currency reporting requirements, that conduct was

alleged to be merely one of the many means by which petitioners sought to achieve their object of defrauding the IRS. Indictment ¶ 23, at 7 (Pet. C.A. App. 72).[6] It is well settled that the government is not required to prove that any particular means used to carry out a conspiracy is itself a crime. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1946). Thus, the government was entitled, in alleging and proving the conspiracy charge, to rely upon petitioners' structuring conduct and evidence of that conduct, regardless of whether that conduct constituted a separate, substantive offense. The court of appeals therefore correctly held that petitioners' conspiracy convictions were not undermined by this Court's holding in *Ratzlaf* that such structuring conduct does not constitute a substantive offense in the absence of knowledge of illegality. Pet. App. 10a-12a.

The court of appeals was also correct in rejecting petitioners' contention that certain comments by the prosecutor and jury instructions could have led the jury to believe that the object of the conspiracy was to violate the structuring law. Pet. App. 12a. In renewing that contention in this Court (Pet. 10-14), petitioners cite the prosecutor's comment during summation that structuring conduct "can impair and

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[6] The indictment also alleged numerous other means, including: defendants' preparation of false tax returns for taxi drivers; defendant Harold Wapnick's underreporting of his income; petitioner Seth Wapnick's underreporting of income from leasing taxi medallions; and petitioners' cashing of third-party checks from businessmen allegedly attempting to conceal their currency transactions and income from the IRS. Pet. C.A. App. 69-72.

impede the IRS in discovering financial information and assuring compliance with the revenue laws." Pet. 12 (emphasis omitted). That statement merely indicated that structuring was one of the means by which petitioners sought to achieve their conspiratorial objective of defrauding the IRS. It was therefore consistent with the allegations of the indictment. The comment did not state or imply (any more than did the indictment) that, if the jury found petitioners guilty of the structuring charges, it was compelled also to find them guilty of the conspiracy charge.

Nor did the jury instructions so state or imply. Petitioners' argument to the contrary (Pet. 13) is based primarily on a single sentence in the instructions, which stated (Pet. C.A. App. 373): "You may find the defendants guilty of the crime of conspiracy to defraud the United States even though the substantive crimes which were the objects of the conspiracy were not actually committed." Read in context, that statement could not reasonably have been understood to alter the conspiratorial objective charged in the indictment. The district court began its instructions on the conspiracy count by reading the charge as set forth in the indictment. *Id.* at 367-372; Tr. 10,525-10,530. Thereafter, the court explained (Pet. C.A. App. 372):

> The crime of conspiracy to defraud the United States is an independent offense. It is separate and distinct from the actual violation of any specific federal laws.

The court stated that one of the elements of the conspiracy offense was an "unlawful agreement" (*id.* at 373), and it described the nature of the "unlawful

agreement" charged in the indictment as follows (*id.* at 373-374):

> In this case, the unlawful agreement charged in the indictment is a conspiracy to defraud the United States[,] which means an agreement or understanding to interfere with, or obstruct one of the lawful governmental functions of the United States by deceit, craft or trickery, or by means that were dishonest.

Subsequently, the court explained that the defendants were charged "with conspiring to accomplish two illegal objectives, namely, 1) impairing the Internal Revenue Service in computing income, and 2) impairing the Internal Revenue Service in collecting information about transactions in currency." Pet. C.A. App. 376.[7] The court also stated: "If the government fails to prove that at least one of the objectives was an object of the conspiracy in which the defendants participated, then you must find the defendants not guilty on the conspiracy count." *Ibid.* Thus, read as a whole, the jury instructions properly distinguished the substantive charges from the conspiracy charge and directed the jury to find petitioners guilty of the conspiracy charge only if it found that they had agreed to one of the illegal objectives specified in the indictment.

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[7] The district court was clearly referring to those two unlawful objectives when it instructed the jury that it had to find beyond a reasonable doubt that at least two of the defendants agreed "to work together in furtherance of the unlawful schemes alleged in the indictment." Pet. C.A. App. 376. Petitioners' reliance (Pet. 13 n.3) on that portion of the instructions is therefore misplaced.

The court of appeals' affirmance of petitioners' conspiracy convictions accords with *United States* v. *Jackson*, 33 F.3d 866 (7th Cir. 1994), cert. denied, 115 S. Ct. 1316 (1995). The defendants in *Jackson* were convicted of structuring violations and conspiracy to defraud the IRS. 33 F.3d at 867-869. On appeal, the government acquiesced in the vacatur of the structuring convictions in light of *Ratzlaf*. *Id.* at 869. The defendants argued that *Ratzlaf* also required the vacatur of their conspiracy convictions. *Id.* at 869-870. Like the court of appeals in this case, the Seventh Circuit in *Jackson* rejected that argument. It observed that, because "the government did not have to demonstrate that the defendants violated the antistructuring laws" to establish the conspiracy, the vacatur of the structuring convictions in light of *Ratzlaf* "has no bearing on the defendants' § 371 convictions."[8] *Id.* at 871.[9]

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[8] Petitioners assert (Pet. 15) that *Jackson* is distinguishable because in that case "neither the indictment nor the government identified the substantive [structuring] violation as an objective of the conspiracy." As explained in the text, *supra*, it was also true in this case that neither the indictment nor the government's proof identified structuring as the conspiratorial objective.

[9] The decision below also accords with *United States* v. *Stern*, No. 94-3319, judgment noted at 68 F.3d 485 (11th Cir. Sept. 20, 1995) (Table), petition for cert. pending, No. 95-965 (filed Dec. 18, 1995). Stern was convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371, by impeding the IRS's collection of information regarding CTRs. On appeal, he argued that the district court should have instructed the jury that, to find him guilty on the conspiracy-to-defraud charge, it had to find that he willfully violated currency transaction reporting requirements. See Gov't C.A.

In *United States* v. *Alston*, No. 94-2195, 1996 WL 79826 (Feb. 26, 1996), the Third Circuit reversed a conspiracy conviction in light of *Ratzlaf*, but in circumstances quite different from those of this case. Alston had been charged in one count with conspiring to defraud the United States and the Department of the Treasury, and conspiring to structure transactions with the purpose of evading the CTR requirements, in violation of 18 U.S.C. 371. In a separate count, he was charged with the substantive offense of structuring, in violation of 31 U.S.C. 5324 (Supp. IV 1992) and 5322(a) (1988). *Alston*, slip op. 2. Insofar as the conspiracy to defraud was concerned, the indictment "allege[d] no more than a conspiracy to defraud the United States by structuring," *id.* at 3; see also *id.* at 12-13, and "the government offered the same body of evidence * * * to support both the charge against Alston for 'conspiracy to defraud' and the charge against him for 'conspiracy to structure.'" *Id.* at 13. In those circumstances, the Third Circuit held that, "to obtain a conviction under either the 'defraud' or 'offense' clause of § 371, the government had to prove that Alston knew that his structuring activities were illegal." *Id.* at 14.

The Third Circuit was careful, however, "not [to] foreclose the possibility of convicting a defendant under § 371's 'defraud' clause based on charges *in addition to* or *different from* pre-1994 acts of structuring." Slip op. 14; see also note 3, *supra* (describing 1994 amendments to structuring statute). It distinguished "cases that have upheld convictions for conspiracy to defraud under § 371 [and that] have all

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Br. at 15 in *United States* v. *Stern*, *supra*. The Eleventh Circuit affirmed the conspiracy conviction.

involved additional charges in the indictment and additional evidence produced at trial, over and beyond that required for a conviction for pre-1994 structuring." Slip op. 14. In particular, the *Alston* court distinguished *Jackson*, *inter alia*, on the ground that *Jackson* "involved extensive 'other evidence' beyond structuring activity demonstrating a conspiracy to defraud the United States." *Id.* at 15. That same feature distinguishes the present case from *Alston*; the indictment in this case alleged, and the evidence showed, that petitioners and their co-defendants sought to defraud the government in many ways in addition to their structuring conduct. See note 6, *supra*.[10]

The Fourth Circuit reviewed conspiracy convictions involving CTR requirements in *United States* v. *Winfield*, 997 F.2d 1076 (1993), but its decision leaves unclear what position that court would take on the question presented here. The defendants in *Winfield* were indicted for conspiracy to commit the substantive offense of structuring transactions to avoid the CTR requirements, but the relevant count of the indictment was captioned "Conspiracy to Defraud." The judge instructed the jury that the defendants were charged with conspiracy "to defraud the United States in violation of 18 U.S.C. § 371 by conspiring to obstruct the CTR filing requirement of 31 U.S.C. §§ 5322 and 5324," and the court of appeals

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[10] Furthermore, the 1994 amendments to the structuring statute deprive of any continuing importance the question whether convictions for conspiracy to defraud the United States must be vacated in light of the vacatur of structuring convictions for *Ratzlaf* error. See *Alston*, slip op. 7 n.12 ("In light of the 1994 amendment to [31 U.S.C.] 5324, we observe that the instant situation is unlikely to occur again.").

ostensibly set out to review the sufficiency of the evidence in support of that theory. *Id* at 1081. The court correctly stated that conspiring to defraud requires only proof of an "intent to defraud the United States" (*id.* at 1082); the court also stated that, "to be convicted of conspiracy to structure transactions to avoid CTR requirements, a party must have knowledge of the reporting requirements and act[] to avoid them," *ibid.* (internal quotation marks omitted), indicating that the court may have viewed the charge as embracing both a conspiracy to defraud the United States and a conspiracy to violate the CTR reporting requirements. The court analyzed the challenge brought by the first of the two defendants by reviewing the sufficiency of the "prosecution's evidence of *a conspiracy to obstruct the CTR requirements*." *Ibid.* (emphasis added). When the court reviewed the sufficiency of the evidence with respect to the second defendant, it looked to "[t]he evidence connecting [the second defendant] to a *conspiracy to defraud the government by obstructing the filing of CTR's*," *id.* at 1083 (emphasis added), but then twice described the charge against that defendant as "*conspiracy to violate the CTR requirements*," *ibid.* (emphasis added). *Winfield* has never been cited by the Fourth Circuit for any proposition. In light of the confusion evident in the opinion regarding the nature of the charges analyzed by the court of appeals, it is too early to tell whether the position of the Fourth Circuit conflicts with that taken by the Second Circuit below, the Seventh Circuit in *Jackson*, and the Eleventh Circuit in *Stern* (see note 9, *supra*).

2. Petitioners also contend (Pet. 4, 17-23) that they were not required to file CTRs in connection with

their check-cashing business and that their convictions under 31 U.S.C. 5313 (1988) and 5322(b) (1988) for failing to do so are therefore invalid. That contention lacks merit.

Petitioners' primary argument is that they were not required to file a CTR each time they cashed a check for more than $10,000 for one of their customers, because Republic National Bank filed a CTR when petitioners withdrew money from one of 13 corporate accounts to obtain the cash to pay their customers. See Pet. 17-18, 23. That argument confuses two separate sets of transactions. As the court of appeals correctly recognized, petitioners' transactions with the Bank were "distinct and separable" from their transactions with the customers of their check-cashing business: "The transactions underlying the structuring counts were the Wapnicks' multiple cash withdrawals of amounts just under $10,000 from Republic National Bank; by contrast, the transactions underlying the CTR charges were the Wapnicks' cashing of their customers' unendorsed, third-party checks in amounts exceeding $10,000." Pet. App. 14a. The separate nature of petitioners' transactions with the Bank, on the one hand, and their transactions with the customers of their check-cashing business, on the other hand, is underscored by the fact that the former invariably involved amounts of less than $10,000, whereas the latter invariably involved amounts of more than $10,000. See *Id.* at 8a; Gov't C.A. Br. 19-21. Thus, contrary to petitioners' suggestion (Pet. 18), they were more than

merely factotums who "delivered" checks and cash back and forth between the Bank and its customers.[11]

Petitioners err in claiming (Pet. 18-21) that their check-cashing business was not a "financial institution" within the meaning of 31 U.S.C. 5313(a). The statute defines that term to include a "cashier of * * * checks," 31 U.S.C. 5312(a)(2)(K), and it is defined by regulation specifically to include "[a] currency dealer or exchanger, including a person engaged in the business of a check casher." 31 C.F.R. 103.11(n)(3);[12] see also 31 C.F.R. 103.11(f); cf. *United States* v. *Levy*, 969 F.2d 136, 140 (5th Cir.), cert. denied, 506 U.S. 1040 (1992).[13] Petitioners and Harold Wapnick were clearly acting as a "financial institution" under the statute and regulation. See *United States* v. *Hawley*, 855 F.2d 595, 601 (8th Cir. 1988) (check-cashing business was "financial institution" under prior version of regulation), cert. denied, 489 U.S. 1020 (1989); see also *United States* v. *Armstrong*, 951 F.2d 626, 629-630 (5th Cir. 1992) (bank's chairman

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[11] It undermines petitioners' argument that the government "could not connect a single third-party businessman's check with a specific check cashed at the bank." Pet. 23. Petitioners prevented such a connection by using a multi-step process: in one step, they deposited their customers' checks for amounts of more than $10,000 into one of the 13 bank accounts; in a separate step, they wrote checks against the accounts for amounts of less than $10,000.

[12] Although some of petitioners' convictions for willfully failing to file CTRs were based on a prior version of the regulation defining "financial institution," see Pet. C.A. App. 348, petitioners attach no significance to that fact.

[13] Effective April 1, 1996, 31 C.F.R. 103.11(f) was redesignated 103.11(i), and 31 C.F.R. 103.11(n)(3) was redesignated 103.11(z)(3). 60 Fed. Reg. 228 (1995); *id.* at 44,144.

of the board was a "financial institution" when he personally exchanged $150,000 money order for $150,000 cash obtained through the bank).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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